Supreme Court, U. S.
FILED
JAN 21 1980
MICHAEL RODAK, JR., CLERK

No. 79-982

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

DENNIS J. ROBERTS II,

Petitioner

v.

THE NARRAGANSETT ELECTRIC COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF RHODE ISLAND

BRIEF IN OPPOSITION

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OPINION BELOW

The opinion of the Rhode Island Supreme Court (Pet. App. 1a-13a) is reported at 404 A. 2d 821.

JURISDICTION

The judgment of the Supreme Court of Rhode Island was entered on July 24, 1979. The petition for a writ of certiorari was filed on December 21, 1979, pursuant to this Court's grant of an extension of time within which to file the petition. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

Section 1 of the Fourteenth Amendment provides in part:

"[N]or shall any State deprive any person of life, liberty, or property without due process of law. . . ."

QUESTIONS PRESENTED

1. Whether the Due Process clause of the Fourteenth Amendment prevents a state from barring collateral attack of a state commission rate order three years after the order was issued.

2. Whether the decision of the Rhode Island Supreme Court that, as a matter of state law, the Rhode Island Public Utilities Commission lacked authority to order refunds of revenues collected years earlier pursuant to a final rate order should be reviewed by this Court.

STATEMENT

This case involves an investigation begun in 1975 when the Rhode Island Attorney General requested the Rhode Island Public Utilities Commission to investigate the implementation by The Narragansett Electric Company (Narragansett) of a 1972 Commission rate order.

On November 30, 1970, Narragansett filed with the Commission a request for a rate increase of $8.9 million. Narragansett proposed to generate $1.7 million of the additional revenues by substituting a new fuel adjustment clause for its then existing clause. Due to relatively low fuel prices in 1970, the test year for the rate case, the existing fuel clause had resulted in credits to certain of Narragansett's customers aggregating $1.7 million (Pet. App. 1a-2a). Elimination of the old fuel clause in 1970 would thus have increased Narragansett's revenues.

The Commission suspended Narragansett's filing for the full statutory period to October 1, 1971, and held hearings in the summer of 1971. Due to the Presidential price freeze of August 1971, the Commission did not rule on Narragansett's filing until January 24, 1972. On that date, the Commission issued a summary order authorizing an increase of $6.4 million (Pet. App. 2a).[1] The summary order, however, did not specify what portion of the $6.4 million was to be attributed to the elimination of the old fuel clause. By January 1972, fuel price increases had greatly reduced the level of credits generated by the old fuel clause (Pet. App. 3a). It thus made a significant difference to Narragansett whether the Commission's summary order was based on test year fuel prices or reflected current fuel prices. Because the order did not address this point, Narragansett requested a meeting with the Commission for clarification (Pet. App. 3a).

The Commission granted this request and a meeting was held on January 25, 1972, at the Commission's offices. The Rhode Island Consumers' Council was not notified of this meeting and did not attend. At the meeting, the Commission stated that the $6.4 million rate increase was separate from the fuel clause change, and directed Narragansett to design compliance rates that would produce a $6.4 million increase based on December 1971 fuel costs. Narragansett submitted compliance rates the next day (Pet. App. 3a-4a).

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[1] A full report was not issued until March 6, 1972.

On January 27, 1972, the Commission held a meeting on the compliance rates attended by all the parties. Before that meeting, Narragansett met with the Consumers' Council to explain its use of current fuel costs in designing the compliance rates. The Commission approved the rates in an order issued on January 28, 1972 (Pet. App. 4a). The rates remained in effect until October 1, 1973, when the Commission granted Narragansett further rate relief. During the effective period of the rates, Narragansett never earned the rate of return authorized by the Commission (Transcript, 5/27/77, pp. 17-18).

No party appealed the Commission's January 28, 1972 rate order. Three years later, at the Attorney General's request, the Commission initiated a review of the case. Following extensive hearings, the Commission in August 1978 issued its report. It rejected the Attorney General's charge that Narragansett had deliberately deceived and misrepresented the facts to the Commission in January 1972 (Pet. App. 5a). The Commission held, however, that the January 25, 1972, meeting at which Narragansett requested clarification of the earlier order was an *ex parte* meeting in violation of the Rhode Island Administrative Procedures Act. R.I. G.L. § 42-35-13. The Commission therefore set aside its January 28, 1972, approval of Narragansett's compliance rates, concluded on reexamination that those rates were excessive, and ordered Narragansett to make refunds to its customers (Pet. App. 5a).

On Narragansett's petition for certiorari, the Rhode Island Supreme Court reversed the Commission, quashed the refund order and remanded the record to the Commission (Pet. App. 13a). The court agreed that the January 25, 1972, meeting was an *ex parte* meeting in violation of

R.I.G.L. § 42-35-13.[2] The court held, however, as a matter of state law, that the Commission was barred by the prohibition against retroactive ratemaking from reopening its earlier approval of Narragansett's rates (Pet. App. 9a-10a). Any other rule, in the court's words, "would encourage each ratemaking hearing to continue indefinitely, encouraging waste of administrative time and resources and discouraging reliance on commission decisions" (Pet. App. 10a). The court also held, again as a matter of state law, that the Commission lacked the statutory authority to order refunds (Pet. App. 12a-13a).

ARGUMENT

This case presents no substantial due process issue. The Rhode Island Supreme Court held as a matter of state law that the Public Utilities Commission could not on collateral attack reopen its own earlier rate order and, in any event, had no authority to order refunds in this case. The decision is soundly based on the substantial state interest in the finality of administrative decision making. Moreover, the extraordinary set of facts underlying the decision is unlikely to recur. No constitutional issue of broad application or significance is implicated. Accordingly, review by this Court is unwarranted.

1. The Due Process Clause of the Fourteenth Amendment does not prevent a state from establishing reasonable rules on the finality of administrative rate orders. The Rhode Island Supreme Court has long held that commis-

[2] The court observed that it was the Commission, not Narragansett, that had violated the statute by not noifying the Consumers' Council of the meeting (Pet. App. 11a-12a).

sion-approved rates are exclusively prospective and cannot be changed retroactively. Even when it finds error on direct review, the court has consistently refused to allow utilities to recover revenues lost during the pendency of the appeal. *E.g., Narragansett Electic Co.* v. *Burke,* 381 A. 2d 1358, 1363-64 (R.I. 1977), *cert. denied,* 435 U. S. 972 (1978); *Bristol County Water Co.* v. *Harsch,* 386 A. 2d 1103, 1108 (R.I. 1978); *New England Tel. & Tel. Co.* v. *Public Utilities Commission,* 116 R. I. 356, 388, 358 A. 2d 1, 20 (1976). In this case, the court held that this principle applied equally to prohibit a collateral attack on the Commission's January 28, 1972, order approving Narragansett's compliance rates.

The strong policy against retroactive ratemaking has long been recognized by this Court in the federal context. *Arizona Grocery Co.* v. *Atcheson, Topeka & Santa Fe Ry.,* 284 U.S. 370 (1932). The policy recognizes the predominent public interest in stable rates and finality in administrative proceedings. The policy is particularly appropriate here where the Rhode Island Public Utilities Commission in 1978 sought to reopen a 1972 final rate order.

Petitioner argues that the January 25, 1972, *ex parte* meeting at which Narragansett sought clarification of the Commission's earlier order automatically invalidates the Commission's January 28, 1972, order (Pet. 18). This argument is unsound. Even on direct appeal, courts require a party to show injury or substantial prejudice from a procedural error to establish reversible error. The totality of circumstances here do not warrant disturbing the January 28 order even apart from principles of finality. Narragansett sought clarification of an ambiguous rate order in order to design compliance rates. There was no attempt to deceive or subvert the administrative process.

The Commission, not Narragansett, violated the state statute prohibiting *ex parte* meetings by not notifying all parties of the meeting.

The cases cited by Petitioner (Pet. 11-13) are distinguishable. First, they all involve direct appeals from disputed agency decisions. This case involves a belated collateral attack on an unappealed rate order. Second, each of Petitioner's cases is an example of flagrant *ex parte* attempts to influence an agency before it had rendered a decision in a case. *Morgan* v. *United States,* 304 U.S. 1, 16-18 (1938) (party wrote a detailed list of 180 findings for the Secretary of Agriculture); *Sangamon Valley Television Corp.* v. *United States,* 269 F.2d 221 (D.C. Cir. 1959) (party bought turkeys and lunch for Federal Communications Commission while his application for a license was pending — a violation of the Commission's regulations); *Massachusetts Bay Telecasters* v. *FCC,* 261 F.2d 55, 66 (D.C. Cir. 1958) (concerned individuals met with Commission while case was pending and "before the issuance of its final decision . . ."); *Home Box Office, Inc.* v. *FCC,* 567 F.2d 9, 52-53 (D.C. Cir. 1977) (widespread *ex parte* contacts throughout the proceeding and "in the crucial period between the close of oral argument . . . and the adoption of the *First Report and Order* . . ."). Here, the *ex parte* meeting occurred *after* the Commission's decision.[3]

In short, the Commission's technical violation in 1972 of the state prohibition of *ex parte* contacts simply did not violate the rights of Rhode Island consumers to procedural

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[3] The issue presented in this proceeding is unlikely to arise again in Rhode Island. Under current Commission procedures, all conferences at the compliance stage of a rate case are on the record after notice to all parties.

due process.[4] The Rhode Island doctrines prohibiting retroactive ratemaking and collateral attack, in any event, provide a firm state ground for the decision below.

2. The Rhode Island Supreme Court not only held that the collateral attack of the 1972 Commission order was prohibited, it also found that the Commission had no authority to award refunds (Pet. App. 12a-13a). The court held that the Commission derived its powers from its enabling act, and found that this statute did not provide any authority to order refunds. The court thus established a second state ground for reversing the Commission's refund order. *See Herb* v. *Pitcairn,* 324 U.S. 117 (1945); *Murdock* v. *Memphis,* 20 Wall. 590 (1875).

Petitioner argues, citing federal cases, that "[s]pecific statutory language granting an agency the authority to order refunds is not necessary" (Pet. 18), and that "the authority to order refunds is implied in the general policy provisions of the state statute" (Pet. 19). Whether or not this is the law applied to federal agencies, it is certainly not the law in Rhode Island. The Rhode Island court held (Pet. App. 12a):

> "As a creation of the General Assembly, the PUC derives all of its powers, duties and responsibilities from its enabling act."

It specifically refused to imply refund power when it was not expressly granted.

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[4] As Petitioner recognizes (Pet. 9-11), it is by no means clear that Rhode Island consumers have a protected property interest in utility rates. In the absence of such a protected interest, Petitioner has no basis for claiming a due process violation.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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January 1980